APPENDIX A

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
WASHINGTON, D.C. 20506

BRUCE E. MARTIN, Petitioner, v. DEPARTMENT OF NAVY, Respondent.	)	PETITION NO. 03800098

DECISION

On October 10, 1979, Bruce E. Martin (hereinafter referred to as petitioner) timely initiated a petition to the Equal Employment Opportunity Commission (EEOC) for review of the preliminary decision of the Merit Systems Protection Board (MSPB) rendered on October 2, 1979 [1] concerning his allegations of discrimination based upon race (Caucasian) in violation of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e et seq. Since petitioner's complaint was pending before January 11, 1979, the effective date of the Civil Service Reform

Act of 1978, it was processed pursuant to EEOC Regulations 29 C.F.R. §1613.801 et seq. The petition to review the preliminary decision of the MSPB was accepted by the Commission pursuant to EEOC Regulation §1613.806.

On October 2, 1979, the MSPB issued the attached initial decision in this proceeding. Also attached are supporting documents covering the processing of this case upto the time of the initial decision.[2/] This Commission has carefully and fully considered the record in its entirety (including the hearing transcript) and the attached documents in light of the allegations of discrimination. The Commission has decided to affirm the preliminary decision of the MSPB as that decision accurately states the facts and correctly applies the pertinent principles of law.

Accordingly, based upon a review of the record, the Commission finds that the agency's

actions at issue were bona fide and free of discrimination.

1/ Petitioner originally appealed to the Federal Employee Appeals Authority (FEAA) of the Civil Service Commission. However, pursuant to the President's Reorganization Plan No. 2 the functions of the FEAA were transferred to MSPB.

2/ Also included are the agency's proposal to remove and decision to remove of October 20, 1978 and December 15, 1978 respectively.

NOTICE OF RIGHT TO FILE A CIVIL ACTION

Pursuant to 29 C.F.R. Section 1613.282, the petitioner is hereby notified that this is the Commission's final decision and that petitioner has a right to file a civil action in the appropriate United States District Court within thirty (30) calendar days of receipt of this decision.

FOR THE COMMISSION:

5/21/81
Date

s/
Executive Officer
Executive Secretariat

A-5

DEPARTMENT OF THE NAVY
COMMANDING OFFICER
NAVAL STATION
PEARL HARBOR, HAWAII 96860

013(21):LM
Ser 2386
Dec. 15, 1978

To: Bruce E. MARTIN, Gard, GS-085-04

Subj: Notice of Decision on Proposed Removal

Ref: (a) Chief of Police, Naval Station, Pearl Harbor ltr dtd 20 Oct 78, Subj: Notice of Proposed Removal

(b) Your ltr dtd 25 Oct 78, Subj: Firing and Termination (Appeal Rights)

(c) My ltr dtd 30 Oct 78, Subj: Rights of Reply to Proposed Adverse Action

(d) Your ltr dtd 20 Nov 78, Subj: Request for Rights to Fair Appeal Procedures

(e) Federal Personnel Manual Chapter 752

(f) Verbatim Transcript of your oral reply conducted 20, 21, and 22 Nov 78

Encl: (1) My ltr to Base Security Officer, dtd 7 Dec 1978, Subj: Inquiry into Allegation of Discrimination

(2) Base Security Officer ltr dtd 12 Dec 1978, Subj: Inquiry into Allegation of Discrimination

(3) Statement of Appeal Rights

1. Reference (a) informed you of the proposal to remove you from your position of Guard, GS-085-04, for disability. The specific reasons for proposing removal action were stated in paragraph (2) of reference (a). You were informed of your right to reply to me in writing and/or to CDR M.G. Clarity, USN, in person.

2. By reference (b) you requested thirty (30) days in which to prepare your reply(s). This request was granted and arrangements were made for a 20 November 1978 oral reply by reference (c).

3. On 20 November 1978 you provided Commander Clarity with a photocopy of reference (d). No further written reply was submitted to me. In reference (d) you requested to present twenty (20) designated character witnesses from the Police Department and the right to take depositions and interrogatories of and cross-examine ten (10) designated current and former employees of the Police Department. Reference (e) does not give employees the right to a hearing in their oral reply. Therefore, your requests for character witnesses, depsotions, interrogatories, and cross-examination have been disapproved. Reference (d) also requested permission to orally present "500 pages of legal research and ligigation." Although this request was granted, the verbatim transcript of your oral reply consisted of 88 typed pages.

4. Your oral reply was heard by CDR Clarity on 20, 21, and 22 November 1978. Reference (f) is the verbatim transcript of these sessions. I

have fully considered your comments presented at these sessions.

a. You made reference on several occasions to unfair administrative procedures and appeal rights. The procedures and rights granted to you are in accordance with the regulations of the Civil Service Commission.

b. Throughout your oral reply you used the term "discrimination". Consequently, on 7 December 1978 I requested the Base Security Officer to make a timely inquiry into your allegations of discrimination. This request and the subsequent report are enclosures (1) and (2), I have found that there is no evidence of discrimination being a factor in the proposal of adverse action.

c. You made reference to incidents which occurred as much as over two years ago. Although the relevance of each incident was not evident, I have considered these actions. I do not find

that you have been treated in an improper or unreasonable manner by the management of the Police Department.

d. You expressed concern that you are being repeatedly punished for the same incidents. Although this is an adverse action, it does not constitute discipline for misbehavior. The incidents referred to in the Statement of Observed Facts or the Notice of Proposed Removal (paragraphs 2(c) - 2(e)) are observed deficiencies in work performance and/or behavior. It is the relationship of these observed deficiencies and the high probability of hazard that I have related to the psychiatric evaluation in making my determination. Your reporting of other incidents did not adversely affect my determination.

5. After full consideration of your replies and the statements in reference (a), I have determined that your separation

based on disability is warranted. A link has been established between the medical conclusions and observed deficiencies in your work performance and behavior. Because of the nature of your official duties, there is also a link between the medical findings and a high probability of hazard that the condition may result in injury to yourself or others or in lessened security of the Pearl Harbor Naval Base. I have also taken into consideration that there are no current Naval Station vacancies for which you are qualified and could be reassigned. Your separation for disability is considered proper and for such cause as will promote the efficiency of the service. Therefore, your removal will be effective 20 December 1978. A Notification of Personnel Action (SF-50) of this action will be sent to you separately.

6. Reference (a) advised you of your option of taking all sick leave to your credit prior to separation. When you requested this option in reference (b), I advised you in reference (c) to submit your request for sick leave directly to Chief of Police Poniatowski on Standard Form 71 (Application for Leave). Chief Poniatowski also orally advised you of your option to submit the SF-71, but you refused to do so. Nevertheless, if you will submit your SF-71 to Chief Poniatowski prior to the effective date of this removal action (20 December 1978), this letter will be amended to reflect the changed effective date.

7. You have the right to appeal this action as set forth in enclosure (3).

s/ Allen L. Shapero

Copy to:

Dr. Clark Martin

A-11

MERIT SYSTEMS PROTECTION BOARD
San Francisco Region
525 Market Street
San Francisco, California 94105

MSPB:RTT:mls

Oct 2 1979

Director
Consolidated Civilian Personnel Office
Department of the Navy
Pearl Harbor
4300 Radford Drive
Honolulu, Hawaii 96818

Appeal: Part 751B
Appellant: MARTIN, Bruce E.
Action Appealed: Remov (claim of discr)

Attached is the decision in the above-captioned appeal.

FOR THE BOARD:

s/
John F. Oldfield
Chief Appeals Officer

cc:
Mr. Bruce E. Martin
514A Kalihi Street
Honolulu, HI 96819

Special Assistant for Civilian
Personnel and Equal Employment Opportunity
Department of the Navy
Washington, D.C. 20350
Attn: OP-143

Office of Policy Analysis
Office of Personnel Management
Room 3508 Attn: Jeanette Neville
1900 E Street, N.W.
Washington, D.C. 20415

MERIT SYSTEMS PROTECTION BOARD
SAN FRANCISCO REGIONAL OFFICE

APPEAL OF BRUCE E. MARTIN
UNDER 5 CFT PART 752B

DECISION NO: SF752B00001
DECIDED ON: Oct 2 1979

INTRODUCTION

By letter postmarked December 22, 1978, Mr. Bruce E. Martin appealed the decision of the Department of the Navy, Naval Station, Pearl Harbor, Hawaii to separate him from the position of Guard, GS-085-04, Step 3, at $10,017 per annum, effective January 31, 1979.

Since appellant was a nonprobationary career employee in the competitive Federal service, his timely appeal comes within the purview of 5 CFR Part 752B and the Board's appellate jurisdication thereunder.

During his oral reply on November 20-22, 1978, and also in his appeal letter, appellant alleged that his separation was

motivated by discrimination based on race (Caucasian). Appellant opted to pursue his appeal under the then current 5 CFR 752B with a review of the allegation of discrimination as it related to the separation action. The agency was requested to furnish an EEO Investigation Report (IR) in compliance with the then current 5 CFR 772.306. That report was provided to appellant by letter dated May 21, 1979 and a copy of that report has been included in the appeal file. A hearing was held in San Francisco, California on August 1 and 2, 1979. Interrogatories were sent to 19 agency employees and the record was closed on September 17, 1979. The transcript (TR) of that hearing and exhibits have also been made a part of the appeal file.

ANALYSIS AND FINDINGS

Procedures

By letter dated October 20, 1978, appellant was given advance warning of at least 30 full days of the proposal to separate him from his position for disability. The current reasons for the proposed separation were set forth as follows:

> "2. In evaluating your medical ability to satisfactorily perform your assigned duties I have considered the following factors:
>
> a. As a Guard assigned to the Naval Base Police Deparment, Naval Station, Pearl Harbor, you are required, on an on-going basis, during either day or night work assignments, under adverse or good weather conditions, or even or uneven work surfaces, on foot or by motor patrol methods, to provide physical security for naval buildings, grounds, installations, facilities, materials, and equipment against espionage, sabotage, fire, theft, trespass, vandalism, terroristic activities, and to perform intersectional point control over pedestrian and/or vehicular traffic during peak traffic hours. Guards must enter and exit various storage compound areas on numerous occasions which are

generally secured against unauthorized entry by large, heavy structured metal and chain link fence gates, which are opened and closed manually on each entry or exit. Guards are expected to physically restrain and/or apprehend persons of various ages, sizes, and physical capabilities for violations of laws, entry/exit regulations, and security violations. In performing these duties, guards must carry a firearm on their person. Guards are expected to work in close association with fellow guard personnel, police officers, military shore patrol personnel, and employees and guests of the naval installation.

b. The United States Civil Service Commission has officially determined the following medical requirements necessary for qualification for Guards in the 085 job series:

(1) The history or presence of a significant psychiatric disorder is disqualifying for guard positions which entail the use of firearms.

(2) The duties of these positions require courteous and tactful contact with the public. Guards may be required to work under trying conditions during emergency situations for hours without a relief. Therefore, emotional and metal stability is essential.

c. Police Department mangement has observed numerous deficiencies in your work performance and behavior which indicate emotional instability and

establish a correlation to a medical finding of disability. A primary problem has been your explosive dealing with co-workers, supervisors, and the people with whom you come in contact in your duty assignments. Examples of these reported conflicts follows:

(1) On 20 March 1978 Officer Kuichi Takayama reported to Sergeant Kenneth Heittman that you had, on that date, driven you assigned patrol vehicle at a high rate of speed through the intersection at 7th Street and Avenue D without stopping at the stop sign. When Mr. Takayama subsequently notified you that he had reported this action, he stated that you told him, 'I'll slap your face.' Mr. Takayama also reported that during the previous week you had driven your assigned vehicle directly at him while he was standing post and had braked the vehicle hard just in front of him. Subsequently, on 4 April 1978 Mr. Takayama reported to Shift Captain Rosado that you had approached him at the rear of the Police Station on 3 April 1978. Mr. Takayama states that you had your police .38 pistol out of your gun holster and in your hand playing with it when you told him to drop the charges he had made against you. Mr. Takayama further stated that on several occasions you had grabbed his uniform shirt and made motions to strike him, and that you had been blowing your whistle very loud at him and other guards while riding in police vehicles. Although many of these statments have been corraborated by other witnesses, you have denied the

allegations. Mr. Takayama subsequently changed his work shift, saying he wanted to avoid contact with you.

(2) On 5 April 1978 Officer James Takata reported to Sergeant Kenneth Heittman that after he told you he was going to put you on report for an incident on 3 Arpil, 1978, you told him, 'You must be prejudiced against me' and'If you want meet me outside the gate it's okay with me. If you want to bring a gun or a knife it's okay also.' Later when you approached Sergeant Heittman on this matter, you reportedly stated, 'Heittman do you know what I would do if I got really mad at Takata? I would take an ax and cut him up in little pieces and kick the little pieces all over the place.' You later denied making these statments.

(3) On 11 May 1978 Officer Irinio Cabanatan reported to Sergeant Alfred Malaluan that while he was at Beat 12 on 10 May 1978, you repeatedly drove through his post blowing your whistle at him for no apparent reason. Later that day when Mr. Cabanatan reported to the station that you had not completed your assigned duties, he reports you stated to him, 'If you not my buddy I'd break your ass' and also made another remark in regard to 'breaking Takata's and Takayama's asses also.' Again, you denied these alleged actions and statements. Mr. Cabanatan subsequently changed his work shift, saying he wanted to avoid contact with you.

(4) On 5 July 1978 Mr. James Lakey, an employee of Pearl Harbor Naval Shipyard, filed a complaint to the Shipyard Duty Officer, group superintendent, and the Union that on that date you had used inappropriate language, specifically 'Hello, Stupid', when he was passing on a bicycle at your assigned guard post at Central and 'G' Avenue Gate. You later denied making this statement."

. . .

"e. Management has also observed deficiencies in your work performance and behavior relating to your seemingly contradictory statements. In some cases one of more persons can positively contradict your statements. The psychiatrist who conducted your fitness for duty examination related your 'controlled fabrications' to a psychopathic personality. Examples of incidents which have included apparently inconsistent statements of yours follow:

(1) On 7 December 1977 you were observed by at least four witnesses to be carrying a transistor radio and listening to it while directing traffic at North Road and Avenue A intersection. You denied this action to Sergeant Ah Sam on 7 December 1977 and to Lieutenant Von on 12 December 1977; however, on 10 December 1977 you apologized to Sergeant Ah Sam for taking the radio on the beat.

(2) On 11 April 1978 you denied to me that you had called Mr. Takayama an 'ass' although Mr. Takayama's charge that you made this statement had been corraborated by a witness, Police Officer Rivera.

(3) On 20 May 1978 when the deck watch of the USS Hawkbill asked you your name, you replied 'Clark'. Your name tag and badge number later identified you and thus contradicted your statement. You later admitted that you were the individual questioned by the deck watch.

f. Based on observed deficiencies, as demonstrated in paragraphs 2. c. through 2. e., in July 1978 you were directed to be examined and evaluated by a medical doctor to determine your medical fitness for duty in the position of Guard, GS-085-04. Concurrently, management detailed you to a set of duties (not an established position) which would remove you from the responsibilities and pressures of base security. At your request the fitness for duty evaluation was conducted by the private physician of your choice, Leonard S. Jacobs, M.D. It was the written conclusion of Dr. Jacobs, dated 20 and 22 September 1978, that you are disabled for the position of Guard, GS-085-04.

g. The report submitted by Dr. Jacobs was reviewed by Howard Gady, M.D., Naval Regional Medical Clinic, Hawaii. Dr. Gady also concluded that you are disabled for the position of Guard, GS-085-04. His memorandum, dated 6 October 1978, concurs with Dr. Jacob's psychiatric diagnosis of 'personality disorder of other specific type, borderline personality with elements of explosive

personality and marked depression.'

h. Due to the nature of your regularly assigned Guard duties (paragraph 2. a.), the medical evluations present a high probability of hazard that your continuation in these duties would result in injury to yourself, other people, or the security of Pearl Harbor Naval Base. As a Guard who is required to carry a firearm while in close and sometimes trying contact with fellow guard personnel, police officers, military shore patrol personnel, and employees and guests of the naval installation, you may be placed in a situation where your explosive personality could endanger life and property."

"Based on the requirements of the Naval Base Police Department, this proposal is considered as being in the best interests of the command and the Department of the Navy."

The current reasons stated in paragraphs 2c and e, are not specific in every instance with respect to names, times, and places. However, I find the cited current reasons for the proposed separation action met the requisite specificity and detail as required by 5 CFR 752.202(a)(1) because appellant had been given a fair opportunity to refute those reasons on November 20 through 22, 1978 as evidenced by the 88 page transcript of his oral reply.

Additionally, in paragraph 2d of the proposed separation notice, appellant was informed that the following prior disciplinary record would be taken into consideration in weighing the penalty:

1. Letter of Reprimand dated November 23, 1976 for failure to follow instructions of supervisors;
2. Letter of Reprimand dated November 9, 1977 for failure to follow instructions of supervisors;
3. Suspension of 5 working days (March 24 - 28, 1978) for repeated violations of written regulations; and
4. Suspension of 5 working days (September 11 - 15, 1978) for failure to carry out instructions.

A review of the above described disciplinary actions establishes that the necessary procedural requirements for specificity and

detail were satisfied; i.e., appellant was informed of the actions in writing, he was given the opportunity to have the actions in writing, he was given the opportunity to have the actions reviewed on the merits by an authority other than the one who took the action, and the actions were made a matter of record (FPM Supplement 752-1, Subchapter S4-3(b)(1)).

The advance notice complied fully with the requirements of 5 CFR 752.202 with respect to appellant's rights, i.e., review of the material upon which the charges were based, reply and rebuttal of those charges orally and in writing or both, reasonable time allowed for reply, and right of representation.

Appellant was granted 30 days within which to prepare his reply and arrangements were made for an oral reply to be presented by him

November 20, 1978. On that day, appellant furnished the agency a letter in which he requested he be given rights to fair hearing procedures. On November 20, 21, and 22, 1978, appellant presented his oral reply. Although appellant objected to an electronic recording of his oral reply, a recording was made and an 88 page transcript of that oral reply was furnished to appellant and has been made a part of the appeal record.

On December 15, 1978, a higher level official than the person who proposed the separation action issued a notice of decision informing appellant that after full consideration of the evidence, including his November 20, 1978 letter, oral reply and past disciplinary record, his separation based on disability was warranted and established December 20, 1978 as the effective date of the separation. On December 19, 1978, appellant was notified that the

effective date of his separation was changed to Janaury 31, 1979 because of his request to take 239 hours of sick leave prior to his separation. The notice of decision was delivered to appellant on December 16, 1978. He was maintained in an active duty status during the notice period.

The proposed separation notice further advised appellant that his placement into another position had been considered but there were no vacant positions for which he qualified through reassignment or change to lower grade and which were considered within the limitations of his disability.

Under the provisions of 5 USC 8337, an employee who has completed 5 years of civilian service and is found by the Office of Personnel Management to have become disabled shall be retired on his own application or on application by his agency. The records in the instant case, however, reveals that appellant was given

his initial Civil Service appointment on August 26, 1974. He, therefore, had not completed 5 years of civilian Federal service at the time of his separation, and was not eligible for disability retirement.

Accordingly, we find that the agency complied fully with the procedural requirements of 5 CFR Part 752B in effecting appellant's separation for disability on January 31, 1979.

Merits

In the proposed separation notice, examples of appellant's performance and behavior indicating emotional instability (paragraph 2c) and examples of apparent contradictory statements made by appellant which the psychiatrist who conducted his fitness-for-duty examination related his "controlled fabrication" to a psychopathic personality (paragraph 2e) were cited as reasons for the separation action. Appellant

contends, however, that his agency supervisors and some of his co-workers were biased against him, acted in a conspiracy against him to have him removed from his position, and violated his constitutional rights to due process by not allowing him the priviledge of a trial for criminal offenses.

While some of the examples cited in the proposed separtion notice might be construed to be of a possibly criminal nature, there is no evidence that appellant was ever charged with any criminal offenses. There is simple evidence that appellant was informed of the complaints filed by agency employees against him, and he was given the opprotunity to rebut or present his version of the events related to the complaints to his supervisors as well as to the Chief of Police. The record is clear that during those discussions with the Chief of Police, appellant was advised of the informal nature of those administrative pro-

ceedings, and on at least one occasion (April 4, 1978), appellant was specifically informed that the matters under discussion were not related to criminal offenses. Therefore, appellant's assertion that he was deprived of due process because he was not extended Miranda rights has no validity because Miranda rights pertain only in cases when suspects are being questioned about criminal offences. 5 CFR Part 752B and agency regulations do not provide for a pre-termination hearing. In sum, there is no evidence that appellant was deprived of his constitutional rights to due process because he was not provided Miranda rights or an opportunity to a trial prior to the separation action.

Regarding specifications in paragraph 2c(1), the March 20, 1978 statement of Police Officer Rivera tends to support Police Officer Takayama's March 20, 1978 report that appellant travelled through the intersection at 7th Street

and Avenue D at a high speed without stopping. Further, appellant's statement to the Chief of Police on April 11, 1978 that, "I haven't talked to him (Takayama) except one time when I asked him why he didn't issue a ticket for the speeding incident; then I could go downtown, pay my fine", further lends support to the fact that appellant was speeding through that intersection. While there are no witnesses to the subsequent altercation in which appellant reportedly stated, "I'll slap your face", a review of the documentary evidence and Officer Takayama's testimony (TR Vol I, Pgs 90 & 100) makes Takayama's report more believable than appellant's denial of that statement. Also more credible is Officer Takayama's testimony under oath that on March 13, 1978 appellant drove his police vehicle directly at him at Beat 15 and braked his vehicle to a stop about 3 or 4 feet from Takayama and that on April 3, 1978 appellant, with a loaded pistol in his

hand, asked Takayama to drop the charges against him (TR Vol I, Pgs 91-2). With respect to the charges made by Officer Takayama that appellant on several occasions had grabbed his uniform shirt and made motions to strike him and appellant had blown his whistle at him and other guards while driving a police vehicle, appellant on April 11, 1978, in response to questioning by the Chief of Police regarding these incidents, stated, "Okay, I think Takayama is exaggerating a bit". This statement implies that such actions more likely than not had taken place. In view of the foregoing, these specifications are sustained.

With respect to specifications in paragraph 2c(2), there were no witnesses to the verbal exchanges between appellant and Police Officer Takata and between appellant and Sgt. Heittman, and appellant did deny he made such statements to Takata and Heittman. However, on April 12, 1978, appellant in his discussion with the Chief

of Police regarding these statements, stated, "I told him that I wished he didn't make so much trouble for me. If he (Takata) had anything against me I wished he would make his complaint off this base". Therefore, there is reason to believe that appellant desired Takata to take some type of action outside of the base. There appears to be corraboration in the type of action proposed by appellant to Officer Takata and to Sergeant Heittman, i.e., "If you meet me outside the gate it's okay with me. If you want to bring a gun or a knife it's okay also" and "Heittman Do you know what I would do if I got really made at Takata? I would take an ax and cut him up in little pieces and kick the little pieces all over the place". In view of appellent's desire to have Takata take some action outside of the base and the similarity between the two types of statements, it is difficult to accept appellant's denial of making the

statements to both Takata and Heittman. It is my finding that appellant more likely than not uttered the two statements. Therefore, the specifications are sustained.

Concerning specifications in paragraph 2c(3), in his discussion with the Captain of the Second Shift on May 17, 1978 and with the Chief of Police on May 22, 1978, appellant admitted that he blew his whistle at Police Officer Cabanatan because the latter was standing on Beat 12 with his back toward appellant and because he, appellant, wanted to attract Cabanatan's attention in order to obtain permission to enter the gate. There is further testimony by Chief of Police that it is improper for a Police Officer to blow his whistle at any person while operating a police vehicle. With regard to the subsequent statements made by appellant to Cabanatan, there is testimony under oath by

Cabanatan that appellant made those statements (TR Vol I, Pgs 75-6). I find no denial by appellant of making those specific statements. Therefore, these specifications are also affirmed.

Regarding the specifications in paragraph 2c(4), the July 5, 1978 statement by Mr. James Lakey reveals that as he was entering the gate at Beat 16 manned by Police Officer Boneza, appellant called out, "Hello Stupid" to Lakey. However, appellant's July 5, 1978 statement shows that when he inquired about the currency of Lakey's bicycle license, Lakey responded that he would kick appellant's "fucking ass" and called him a "son of a bitch" adding further that appellant was a "dumb person and weak in physical nature". Officer Boneza's July 5, 1978 statement indicates that Mr. Lakey and appellant arrived almost simultaneously at the Beat 16 gate and that appellant said something to Mr. Lakey, who responded "only two persons know that [appellant] is stupid; his mother and [appellant]". Sgt. Lemanski, who was called to the scene to investigate the incident, states

in his July 5, 1978 report that Mr. Lakey informed him that "appellant called him names such as stupid, threatened to stamp in his face, and also to harass him at every opportunity possible". The preponderance of the evidence shows that appellant made the initial remark, probably, "hello stupid" or "How's it stupid". While appellant asserts that Mr. Lakey resisted when he was stopped by appellant to check the currency of his bicycle license, it appears that the verbal altercation had taken place prior to appellant's inquiry about the license. These specifications are therefore sustained.

With respect to specifications contained in paragraph 2e(1), the facts of the December 7, 1977 incident pertaining to the portable transistor radio are not at issue. Although appellant is now questioning those facts, it must be noted that when he was suspended for 5 workdays for the carrying of a portable

radio other than that issued by the department (March 24-28, 1978), he did not grieve or appeal that suspension even though he was given the opportunity to do so. At issue are appellant's contradictory statements regarding the incident, i.e., denial of the incident to Sgt. Ah Sam on December 7, 1977 and to Lt. Von on December 12, 1977 while apologizing to Sgt. Ah Sam on December 10, 1977 for taking that transistor radio on the beat. Since appellant has not denied making the above statements to his supervisors, these specifications are affirmed.

Concerning specifications in paragraph 2e(2), the April 11, 1978 report by Lt. Varner states that Police Officer Rivera, on April 3, 1978, was the driver of the police vehicle in which appellant was a passenger and that he, Rivera, recalls that in the vicinity of Beat 15, appellant shouted "ass" but Rivera did not know to whom such a

remark was directed. While appellant denied making such a remark to the Chief of Police on April 11, 1978, the latter in referring to Officer Takayama's complaint informed appellant that the incident occurred on March 31, 1978 according to Takayama. My finding, therefore, is that contrary to the Chief of Police's assertion, there was no corroboration by Officer Rivera of Officer Takayama's charge. For this reason, this specification is not valid.

Regarding the specification in paragraph 2e(3), the boarding of the USS Hawkbill by appellant on May 20, 1978 and his questioning of the deck watch are not at issue. Although appellant now questions those facts, appellant was suspended for 5 workdays between September 11 and 15, 1978 for failure to carry out instructions. Although he was given the opprotunity to grieve or appeal that suspension, there is no evidence that he did so. At issue only is that appellant identified himself as "Clark" to the deck watch when his

name tag clearly identified him as "Martin". Since there is no denial of this action by appellant, this specification is sustained.

Appellant contends: (1) that his supervisors and co-workers conspired to discredit him with the ultimate objective to terminate his employment with the agency; (2) that his supervisors acted as catalysts in that conspiracy; (3) that the Chief of Police (Caucasian) and the Assistant Chief of Police (Hispanic-race unknown) discriminated against him and harassed him on 32 different occasions; and (4) that they interrogated him in violation of his civil rights on at least 26 occasions, 12 of which for Federal crimes.

The record is replete with documentation regarding co-workers' charges against appellant, supervisors' pre-action investigations of those charges, and discussions between supervisors and appellant where the latter was provided the opportunity to rebut and present his

version of the charges. While it is true, as alleged by appellant, that the Captain and Supervisors of the 2nd Shift were often involved in these actions, this is understandable because, as appellant's 1st and 2nd line supervisors, charges made by co-workers and others against appellant would be made to them and they would have to investigate those charges. The frequency of their involvement does not indicate a conspiracy as alleged by appellant. Two the minority co-workers, who appellant believes conspired against him, voluntarily changed their work shift to avoid further contact with appellant. These actions are not suggestive of a conspiracy on the part of these co-workers to continue to discredit appellant. The fact that a 1st line supervisor was reprimanded for calling appellant a "son of a bitch" and that a co-worker (Oriental) was reprimanded also for calling appellant a

"fucking haole (Caucasian)" (TR Bol I, Pgs 149 & 157) dispel the notion that the Chief and Assistant Chief of Police were involved in the alleged conspiracy. There was also testimony by the Chief of Police that he did not believe that the charges by appellant's three Oriental co-workers were inter-related and that he discounted any suggestion of a conspiracy among these co-workers to deliberately discredit appellant (TR Bol I, Pgs 143-4). The Chief also did not believe that any of appellant's supervisors acted in concert to discredit appellant (TR Bol I, Pgs 149-52).

In summary, the preponderance of the evidence shows that appellant's co-workers reported appellant's performance deficiencies and behavior to the supervisors who only became involved in pre-action investigations and discussions with appellant in the per-

formance of their duties. I find little or no evidence of any conspiracy to deliberately discredit appellant.

Appellant bases his complaint of discrimination because of his race (Caucasian) on: (1) actions taken by his supervisors as a result of co-workers reporting him to those supervisors; (2) discriminatory remarks made against him by two Oriental co-workers; and (3) the psychiatric fitness-for-duty examination which was forced upon him under threat of termination of employment in which a biased statement of observed facts was submitted by the Assistant Chief of Police (Hispanic-race unknown) to the psychiatrist.

A survey of the work force of the Base Police Department shows that of 177 employees, 81 or 45.8% were Caucasians. Among the 48 security guards, 22 or 45.8% were

Orientals, and 4 or 8.3% were black (IR Exhibit #30 and 31). In short, Caucasian employees were well represented in a work force operating in an area where there was a large percentage of minorities in the commuting area.

A review of the documents pertaining to the complaints and charges lodged against appellant by his co-workers and by others as well as those documents pertaining to actions taken by his supervisors in conjunction with the above charges reveals that in the vast majority of instances, such complaints and charges were initiated by his co-workers because of action taken by or lack of action by appellant. There is little or no evidence of any conspiratorial action by his supervisors and/or co-workers to discriminate against appellant because of his race. There is, however, two instances where two Oriential police officers during altercations

with appellant called him a "mother fucking haole" and a "fucking haole". However, there is no evidence that the two incidents were related and there was no evidence that the two incidents were related and there was no evidence produced which shows that the officers in question were aware of what had transpired between each other and appellant. Further, it must be noted that one of the Oriental officers was reprimanded for using abusive and discriminatory language to appellant. Of the 16 supervisors and co-workers who have become involved with appellant, 10, including the Assistant Chief of Police (Hispanic-race unknown) were Caucasians and 6 were Oriental of whom 3 were supervisors.

Appellant asserts that the statement of observed facts prepared by and submitted to the examining psychiatrist by the Assistant Chief of Police was not only based on racial

prejudice but also the agency failed to follow proper procedures in the administering of the fitness-for-duty examination to him.

My review of the documents and testimony pertaining to the fitness-for-duty examination reveals that it was conducted properly in accordance with FPM Supplement 752-1, Subchapter S1-3a(5), FPM Chapter 339, Subchapter 1-3, and FPM Chapter 831, Subchapter 10-10. In mid-July 1978, appellant was directed in writing to report for a fitness-for-duty psychiatric examination after a panel of three agnecy personnel (a Medical Officer, Employee Reltions Specialist, and Assistant Chief of Police) on July 14, 1978 unanimously agreed that the circumstances warranted a psychiatric examination [FPM Chapter 831, Subchapter 10-10a (5)(b)(i) & 10-10a(5)(c)]. On July 18, 1978, appellant indicated a desire not to be examined by a Federal medical officer and on the same date, he submitted the names of three

(3) board certified psychiatrists by whom he was willing to be examined [FPM Chapter 831, Subchapter 10-10(c)(ii) 2 & 3]. On July 21, 1978, appellant designed Dr. Clarke Martin as his representative [FPM Chapter 831, Subchapter 10-10a 5(c)(ii) 1] and on August 2, 1978, Dr. Martin was advised by the Assistant Chief of Police that he would be furnished copies of all notices, determinations, decisions, or other written communications issued to appellant under these procedures and that if Dr. Martin wished to have additional information or to review appellant's case file to contact him. The statement of observed facts submitted by the Assistant Chief of Police was furnished to the examining psychiatrist along with the CSC Qualifications Standard, appellant's Position Description, Standard Form 78 (Certificate of Medical Examination), and CSC Form 3178 in accordance with FPM Supplement 752-1, Subchapter S1-3a(5)(b) which provides that "the employee should be

referred for medical examination with a statement of the particular demands of the position and a statement of how the employee's performance or behavior fails to meet these demands" (underscoring added). Appellant's assertion that the statement of observed facts submitted by the Assistant Chief of Police was improper because it was based primarily on hearsay information rather than on actual observations by him is not valid because, as appellant's 4th line supervisor who was responsible to submit that statement, the Assistant Chief must rely on the reports of appellant's other supervisors because he had little personal daily contact with security guards in general. It was also the testimony of the Chief of Police (Caucasian) that if he were not on annual leave, it would have been his responsibility to submit that statement and he, too, would have had to reply on the reports of appellant's supervisors (TR Vol I, Pg 139).

As for appellant's allegation that he was forced to take the fitness-for-duty psychiatric examination under the threat of losing his job if he failed to submit to that examination, the agency, under the provisions of FPM Supplement 752-1, Subchapter S1-3a(5)(c)(d) had the authority to direct an employee to take a fitness-for-duty examination and if the employee refused to submit to a mecial examination, he may be removed for refusing [May v USCSC, 230 F. Supp. 659 (W.D. La. 1963) and Yates v. Manale, 377 F. 2d 888 (5th Cir. 1967)]. However, in the instant case, there is no evidence that the agency forced appellant to undergo the fitness-for-duty examination under the threat of removal for failure to do so. Further, appellant was examined by a physician of his choice selected by him under the provisions of FPM Chapter 339, Subchapter 1-3c. There is additional evidence that on a previous occasion (April 4, 1978) when the Chief of Police suggested to appellant that he

either see a private doctor or a Navy Medical Officer to see if they could help him, appellant. stated he was all for that and didn't see anything wrong with that. Appellant told the Chief that he would make an appointment to see a psychiatrist and would have him call the Chief regarding his findings. However, while there is evidence that appellant consulted a psychiatrist, there was no communication from that psychiatrist.

Dr. Jacobs saw appellant on September 8, 1978 and submitted his report of psychiatric examination to the Occupational Medical Officer on September 22, 1978. In that report, Dr. Jacobs found that appellant had some psychiatric disability and that the disability did prevent him from useful and efficient service in the position of Security Guard.

Although appellant questions the validity of the medical findings by Dr. Jacobs on the basis that the length of interview conducted by him was insufficient

to make any type of legitimate psychiatric findings, it is noted that Dr. Jacobs not only contacted appellant's own physician who had him under his care since 1977 but he, Jacobs, reviewed a WAIS test, Bender Gestalt Test, Block Design Test, and the Minnesota Multiphasic Personality Inventory Test (MMPI). In view of the above, I have no reason to question the psychiatric findings by Dr. Jacobs. Although appellant has subsequently submitted a Psychiatric Evaluation Report by a psychiatric resident, prepared in January 1979, this report is much less comprehensive than Dr. Jacobs' report and does not indicate any review of any prior objective medical evidence but includes a statement that this psychiatrist made no attempt to substantiate the history given to him by appellant.

Appellant asserts that the conclusion made by the Occupational Medical Officer (Dr. Howard Gady, M.D.) on October 6, 1978 that he was disabled for the position of

Guard is invalid because Dr. Gady is not a psychiatrist and did not even interview him.

The medical documents in the instant case reveal that Dr. Gady, upon his review of the medical examination report submitted by Dr. Jacobs, concurred in the findings and conclusions made by the latter. If Dr. Gady had any questions about those findings and conclusions, it was within his authority to refer appellant to another psychiatrist or to consult another psychiatrist. Therefore, I have no reason to question the October 6, 1978 report by Dr. Gady.

With regard to appellent's allegation that the Assistant Chief of Police (Hispanic-race unknown) was racially biased against him and submitted a statement of observed facts which was prejudicial to him, an interrogatory prepared at the request of appellant was sent to 19 agency personnel to determine if the Assistant Chief of Police was racially

prejudiced against appellant. While 6 of those interrogatories were returned, (HE #1 through #6), one (HE #1) was returned uncompleted, two (HE #3 & 5) were completed but were not sworn to or affirmed, and three (HE #1, 2 & 6) were completed properly. All five stated they had no knowledge of any racial prejudice on the part of the Assistant Chief toward appellant. Additionally, the testimony of the Captain of the 2nd Shift and the Chief of Police shows that none of the Caucasian police officers to whom interrogatories were sent and of whom they were acquainted on the job complained to them that the Assistant Chief of Police and discriminated against them on the basis of their race (TR Vol I. Pgs 123-8 ¢ 158-9). The preponderance of the evidence does not support appellant's allegation that the Assistant Chief of Police influenced the preparation of the

statement of observed facts in such a manner as to deliverately discredit him.

In summary, I find that the agency has sufficiently established a link between the medical conclusion of disability and the observed work performance deficiencies and behavior of appellant on the job and has properly determined that there is a high probability that appellant's psychiatric condition may result in injury to him or others because as a security guard he must carry firearms. In this respect, it is noted that the agency took action as early as July 18, 1978 to detail appellant to other duties where the carrying of firearms was not a requirement pending the results of the fitness-for-duty medical examination.

I further find that the procedural requirements of 5 CFR Part 752B were met in effecting appellant's separation for

disability. As to the merits, the reasons given by the agency are sustained, except as noted, and I find no substance to appellant's allegation of racial discrimination with respect to his separation. It is my conclusion that the separation action was taken for such cause as to promote the efficiency of the service.

DECISION

The agency action is affirmed.

This is an initial decision of a presiding official. It will become the preliminary decision of the Board 35 days after issuance, unless a petition to reopen is filed with the Board or the Board reopens the initial decision of its own motion. If a petition to reopen is filed or if the appeal is otherwise reopened, the preliminary decision will be issued by the Board itself.

Either party may request the Board to reopen the initial decision. The Board may grant a petition to reopen when the party requesting reopening submits written argument or evidence which tends to establish that:

(1) New and material evidence is available that was not readily available when the decision of the presiding official was issued;

(2) The previous decision of the presiding official involves an erroneous interpretation of law or regulation, or a misapplication

of established policy;

(3) The decision of the presiding offical is of a precedential nature involving new or unreviewed policy considerations that may have effect beyond the case at hand; or

(4) The previous decision of the presiding official involves policy implications extending beyond the case at hand of such significance as to merit the personal attention of the Board members.

Any petition to reopen must be received, in triplicate, by the Secretary of the Merit Systems Protection Board, Washington, D.C. 2019 no later than 35 days after the issuance of this initial decision.

The appellant may petition the Equal Employment Opportunity Commission (EEOC) to review the Board's preliminary decision on any issue of prohibited-discrimation no later

than 35 days after the issuance of a preliminary decision by the Board. If the appellant does not file a petition for review with EEOC within the time limit, the Board's preliminary decision shall become final. In the event that a petition for a review is filed with EEOC, the Board's preliminary decision shall become final on all issues, other than issues of prohibited discrimination, on the date EEOC's decision on the issues of discrimination becomes final.

Appellant may file a civil action in an appropriate U.S. district court from the Board's final decision involving issues of prohibited discrimination. If such a civil action raises issues of discrimination based on race, color, sex, national origin, or handicap, it must be filed no later than 30 days after the Board's decision on the issue of discrimination becomes final.

FOR THE BOARD:

s/

Roy T. Takai
Presiding Official

APPENDIX B

U.S. DEPARTMENT OF LABOR

Office of Workers' Compensation Programs

In the matter of the claim for compensation under the Federal Employees' Compensation Act (5 USC 8101)	COMPENSATION ORDER REJECTION OF CLAIM CASE NO. A15-28506
CLAIMANT: BRUCE E. MARTIN	
EMPLOYED BY: DEPARTMENT OF THE NAVY (Naval Base Police, Pearl Harbor, Hawaii)	

Such investigation in respect to the above entitled claim having been made as is considered necessary, and after consideration of such claim and reports of the record, the Office makes the following:

FINDINGS OF FACT

1. The claimant, a Guard for the above noted employer was removed from that position on December 13, 1978, following a

determination that he was unfit for duty in that capacity due to psychiatric problems.

2. The fitness for duty psychiatric evaluation, along with other factual and medical information submitted by the employer, shows that the claimant's psychiatric condition was precipitated by events not related to his employment.

3. The claimant, who asserted that he did not in fact have a psychiatric condition, initiated grievances alleging that his separation was motivated by racial discrimination, and that he was persecuted and harassed by supervisory personnel.

4. The claimant has provided no substantive factual or medical evidence to show that his disabling medical condition was caused, or materially aggravated, precipated, or accelerated

by factors of his Federal civilian employment, and such a relationship has not been established.

ORDER

It is ORDERED that the claim for compensation be and the same is hereby REJECTED for the following reason:

The claimant has not met his burden of proof of disability causally related to factors of his employment.

DATED: May 18, 1982

cc: By Order of the Director

Mr. Bruce E. Martin
1301 Lusitcant Street #405
Honolulu, HI 96813

CCPO Pearl Harbor (Code 22)
4300 Radford Drive
Honolulu, HI 96818

/s

E.F. Ducey
Deputy Commissioner

APPENDIX C

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF HAWAII

BRUCE E. MARTIN, Plaintiff, vs. UNITED STATES OF AMERICA and UNITED STATES NAVY, Defendants.	CIVIL NO. 78-0338

DECISION AND ORDER GRANTING MOTION FOR SUMMARY JUDGMENT AND/OR TO DISMISS

On September 5, 1978, Plaintiff Bruce E. Martin filed a complaint pro se alleging numerous constitutional and statutory violations by the United States Navy in its termination of Plaintiff as a Federal Civil Service security guard on the United States Naval Base at Pearl Harbor.[1/] The case is now proceeding under the fifth amended complaint which was filed on December 7, 1978, and seeks $1,000,000 in damages plus $50,000 in legal fees. The amended complaints were filed with neither leave of court nor concurrence of the Defendants.

On January 26, 1979, this Court issued an order abating action until Plaintiff's administrative appeals were exhausted. Following a hearing, the Merit Systems Protection Board upheld Plaintiff's termination by the United States Navy. Defendants' motion to dismiss and/or for summary judgment was denied on May 22, 1980. Since that motion was denied, the parties have conducted extensive discovery and Defendants have renewed their motion contending that the record now shows that the case may be disposed of without trial.

I. Facts

The facts in abbreviated form and as found in the administrative proceedings but absent inferences about reasons for Plaintiff's termination are as follows.

Plaintiff was a civilian security guard at Pearl Harbor from August 1974 to

January 1979. In part, he had responsibilities for physical security of the base and traffic control. He carried a firearm and could apprehend violators on base. Plaintiff established a record of letters of reprimand and suspensions from duty. Particularly, from March through July of 1978, five reports of misconduct were written about him, all concerning incidents of confrontation with fellow workers or observations by co-workers of Plaintiff's conduct. These incidents included Plaintiff's driving a patrol vehicle at a high rate of speed through an intersection without stopping; making threatening or offensive remarks to co-workers, making serious threats of physical harm to co-workers by use of a gun or vehicle; and using inappropriate language to and blowing his whistle at

co-workers. Some co-workers asked to change shifts to avoid further confrontations with Plaintiff.

Following this time period, Plaintiff was directed to be examined by a private psychiatrist for a fitness-for-duty evaluation. Plaintiff chose a private psychiatrist from a list provided by the Navy. The evaluation resulted in a finding that Plaintiff was disabled for the position of guard. With a proposed notice of termination issued on October 20, 1978, administrative proceedings began. During an oral reply to the notice in November of 1978, Plaintiff alleged he was a victim of racial discrimination within the base police force. The official administrative inquiry into the allegation concluded that racial discrimination was not a consideration in his removal. The official notice of termin-

ation was issued on December 15, 1978, with, after modification, a removal date of January 31, 1979. Plaintiff appealed through the Federal Employees Appeal Authority and, following a hearing, Plaintiff's termination was upheld on October 2, 1979.

The suit filed in this Court now seeks reinstatement, back pay, and damages based on Plaintiff's termination and also alleges various tort and constitutional injuries. The allegations relating directly to Plaintiff's termination will be considered first.

II. Termination

A. Review of Agency Action

Jurisdiction to review actions of federal agencies lies under 28 U.S.C. § 1331(a). Under the Administrative Procedures Act, the scope of judicial review of agency action is limited to whether applicable procedures were com-

plied with and whether the action is supported by substantial evidence and is neither arbitrary, capricious, nor an abuse of discretion. Cafferello v. U.S. Civil Service Com'n., 625 F.2d 285 (9th Cir. 1980); Albert v. Chafee, 571 F.2d 1063 (9th Cir. 1977).

This Court finds that all the procedures to which Plaintiff was entitled at the time under 5 C.F.R. § 752.202 were provided. That is, Plaintiff was given 30 days advance written notice stating specificially all details of the reasons for termination; the material relied upon was made available to Plaintiff; Plaintiff was given a reasonable time to answer both orally and in writing; and notice of decision was given which advised Plaintiff of the applicable appeal rights. As to most steps in the

proceedings, Plaintiff was given more than the required time and information.

The administrative record, from the notice of proposed termination through the final administrative appeal, contains overwhelming evidence of the reasons for Plaintiff's termination. Included are written reports of misconduct and direct testimony by co-workers and supervisors and evidence of previous official action against Plaintiff in the form of letters of reprimand and suspensions from duty. Though Plaintiff's version of the various incidents differs from that of others involved, the administrative officials were not required to believe Plaintiff, and, in fact, his credibility was greatly lessened by the changing versions of his stories. The agency decision to terminate Plaintiff is supported by substantial evidence.

The United States Navy's action is neither arbitrary, capricious, nor an abuse of discretion. The conduct attributed to Plaintiff consisted of numerous, serious offenses some of which might have subjected him to criminal prosecution. See Cafferelo, supra at 289. The offenses might subject any federal employee to termination but obviously are extremely serious and disabling for the position of security guard where carrying a firearm and exercising the authority to cite and control personnel are part of the job.

B. Racial Discrimination Claim

Plaintiff bases his claim for relief under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-16, on the theory that his termination was motivated by racial discrimination.

When a federal employee raises employment discrimination claims, the employee is entitled, under Chandler v. Roudebush, 425 U.S. 840 (1976), to the same right to a de novo proceeding as that enjoyed by an employee in the private sector, 42 U.S.C § 2000e-5. If a suit brought by a private sector employee properly could be disposed of on a motion for summary judgment, then that procedure also is appropriate for a suit by a federal employee. Weahkee v. Perry, 587 F2d 1256, 1263 (D.C. Cir. 1978); Mahroom v. Hook, 563 F.2d 1369, 1376 (9th Cir. 1977). The employee's right is to "a fresh determination of the facts and issues by the district court." Weahkee at 1263. This determination may be based in part on the administrative record and on any additional evidence necessary for decision in the case. The determination

may be made on a motion for summary judgment even after previous such motions have been denied. Mahroom at 1377.

Since Plaintiff instituted this case, numerous pleadings, documents and discovery have been filed, mostly by Plaintiff. In addition to the administrative record, this Court has before it several pleadings and discovery documents in which Plaintiff presents his version of the facts and his legal conclusions drawn therefrom. Also, both Plaintiff and Defendants have filed numerous affidavits of individuals directly or indirectly involved in the termination of Plaintiff. Therefore, the record in the case is extensive and this Court can make a fresh determination of the facts and issues

as to the racial discrimination claim and not simply review an administrative record to determine whether substantial evidence supports the findings in that record.

Under Rule 56 of the Fed. R. Civ. P., a moving party is entitled to summary judgment on an issue if the party can show that there is no genuine issue of material fact that the moving party is entitled to judgment as a matter of law. Upon a de novo review of the record in this case, this Court finds no genuine issue of material fact as to any employment discrimination practice. That is, there is no genuine issue as to any fact that will affect the outcome of the litigation. Mutual Fund Investors v. Putnam Management Co., Inc., 553 F.2d 620, 624 (9th Cir. 1977). The evidence and inferences must be construed

in the light most favorable to the party opposing the motion. However, Plaintiff's "version of the facts must support a viable legal theory which would entitle him . . ., if accepted, to a judgment as a matter of law." Id. In addition, conclusory allegations that assume certain underlying motives for which there is no factual basis do not raise genuine issues for trial. Marks v. United States, 578 F.2d 261, 263 (9th Cir. 1978). Plaintiff here raises conclusory allegations that, even if accepted, would not entitle him to judgment as a matter of law and, Defendant's motion for summary judgment must be granted as to the issue of racial discrimination.

Plaintiff raises the following two types of allegations to support his claim of racial discrimination; (1) racially derogatory remarks were made to him by co-workers, and (2) racial

motivation played a part in his supervisors' decision to terminate him as incompetent for duty.

There is no dispute that two co-workers made racial remarks to Plaintiff, calling him a haole (Caucasian), and that they were disciplined for the remarks. There is no indication that these remarks nor the attitudes of the co-workers were in any way related to employment practices of the United States Navy. As the Ninth Circuit has pointed out, Title VII was not directed at the eradication of all discrimination by private individuals but rather was directed at the eradication of discrimination by employers against employees. Silver v. KCA, Inc., 586 F.2d 138, 141 (9th Cir. 1978). Were the argument that such private conduct were prohibited

followed, a court would:

> extend the protection of the statute to the situation in which no employment practice of an employer was involved, but only an isolated incident between co-workers, and the court . . . would clearly exceed the intent of Congress and the plain language of the statute. . . .

Id.

According to Plaintiff's deposition, his allegations concerining racial motivation by supervisors in his termination are based on his view that Assistant Chief of the Naval Base Police, Louis C. Pagan, discriminated against him by sumitting an untrue statement of facts to the examining psychiatrist. Plaintiff also alleges that subsequent actions by the Chief of Police and the Commanding Officer of the Naval Station at Pearl Harbor in supporting the actions of Mr. Pagan[2/] constitute racial discrimination. Since this alleged discriminatory conduct and the decision to teminate

occurred at the supervisory level where hiring and termination decisions take place, the allegaions must be considered in the light most favorable to Plaintiff as possibly constituting an employment practice.

To establish a prima facie case of discriminatory termination where there is no direct evidence, a Plaintiff in a Title VII case must establish, as modified from McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973), the following facts:

> (1) That he is a member of a protected group, (2) that he was qualifed for the job he was performing, (3) that he was satisfying the normal requirements in his work, (4) that he was discharged, and (5) that after he was discharged, the employer assigned the same work to an employee of a different group.

Flowers v. Crouch-Walker Corp., 552 F2d 1277, 1282 (7th Cir. 1977); Sherkow v. State of Wis., 630 F.2d 498, 502 (7th Cir. 1980); Person v. J.S. Alberici Const. Co., Inc., 640 F.2d 916,919 (8th Cir. 1981).

The administrative and court records indicate that Plaintiff has not demonstrated and cannot demonstrate that he was satisfying the normal work requirement and, therefore, Plaintiff cannot establish a prima facie case.[3] The record contains the numerous reports of misconduct and shows that the frequency and seriousness of the incidents alone could establish Plaintiff's lack of fitness for the position of security guard even without the psychiatric opinions to that effect.[4] As the court stated in Flowers, supra at 1282-1283:

> Some showing of satisfactory performance is necessary to raise an inference of discrimination in discharge of a racial minority member. . . . Attributing a discharge to racial discrimination without any evidence that plaintiff was meeting normal job requirements would be unwarranted and unfair. Satisfactory performance is an ordinary prerequisite of continued employment, just as job qualification is an ordinary prerequisite to hiring.

II. Tort Claims

Plaintiff alleges numerous torts committed by employees of the United States, including harrassment, libel, slander, defamation of character, terroristic threats, assault, and improper release of confidential medical records. Plaintiff's fifth amended complaint and other pleadings and exhibits show that the tortious acts allegedly were committed either while Plaintiff was on duty or were in some other way connected with his employment.

Though Plaintiff cites the Federal Tort Claims Act ("FTCA") as the basis for juris-

diction, if Plaintiff's alleged injuries occurred in the performance of his duties, his remedy may lie under the Federal Employees Compensation Act ("FECA"), 5 U.S.C. §§ 8116(c) and 8173. Reep v. United States, 557 F.2d 204 (9th Cir. 1977); Posegate v. United States, 288 F.2d 11 (9th Cir. 1961).

If there is a substantial question as to whether an employee's injuries are covered by FECA, the employee may not bring an action under the FTCA at least until after administrative proceedings are pursued and the Secretary of Labor has decided that the employee is not covered by FECA.[5/] 5 U.S.C. § 8128(b); Reep, supra; Avashti v. United States, 608 F.2d 1059 (5th Cir. 1979). The power to determine and make an award for or against payment of compensation is also vested in the Secretary of Labor. 5 U.S.C. § 8124. Therefore, the

tort claims presented by Plaintiff must be dismissed for lack of jurisdiction.

III. Constitutional Claims

Plaintiff, in various places in the fifth amended complaint and in other documents, contends that he was deprived without due process of law of his property right to pursue his chosen profession of law enforcement.

Plaintiff was a non-probationary federal civil service employee who did have a property right in not being discharged except for just cause. However, under Arnett v. Kennedy, 416 U.S. 134 (1974), the civil service discharge and hearing procedures used in Plaintiff's case were found to satisfy the Due Process Clause of the Fifth Amendment and Plaintiff's due process claim as to his termination must be dismissed.[6/]

Plaintiff also alleges that he was denied his right to trial and to due process

of law under the Constitution in that he was found guilty of certain crimes in the administrative proceeding. Plaintiff was not charged with any criminal acts even though some of the allegations made against him may have led to such action. Evidence of allegedly unlawful conduct may be used in a termination proceeding even though no prosecution was pursued, and no constitutional violation occurs as a result. Johnson v. United States, 628 F.2d 187, 193 N. 9 (D.C. Cir. 1980).

Plaintiff also alleges that his due process rights were violated by the use of hearsay evidence in the administrative proceedings. The use of hearsay evidence in administrative proceedings does not violate the Due Process Clause. Calhoun v. Blair, 626 F.2d 145 (9th Cir. 1980).

IV. Remaining Statutory Claims

Plaintiff also raises claims that various federal statutes were violated by his termination. As to each statute, the claims must be dismissed for failure to state a claim upon which relief can be granted. The reasons for each are as follows:

(1) 5 U.S.C. § 552 - Plaintiff makes no allegation that Defendants failed to make public information that this statute requires them to make public.

(2) 18 U.S.C. §§ 241 and 242 - These statutes are criminal provisions that provde no basis for civil liability. Aldabe v. Aldabe, 616 F.2d 1089 (9th Cir. 1980).

(3) 18 U.S.C. § 789 - This criminal statute provides no basis for civil liability.

(4) 28 U.S.C. § 1346(b) - This statute provides for jurisdication in the federal courts when the United States is the Defendant but establishes no liability.

(5) 28 U.S.C. § 1653 - This statute allows for amendment of pleadings to show jurisdication but establishes no liability.

(6) 28 U.S.C. § 2402 - This statute establishes only that there is no right to jury trial in suits against the United States.

(7) 42 U.S.C. § 1983 - This statute does not apply to actions of the United States or its employees. District of Columbia v. Carter, 409 U.S. 418, 424-425 (1973).

(8) 42 U.S.C. § 1985 - This statute may not be used to redress violations of Title VII of the Civil Rights Act of 1964. Great American Federal Savings & Loan v. Novotny, 442 U.S. 366, 378 (1979).

V. Claims

In the fifth amended complaint, Plaintiff names the United States, the United States Navy and Kaiser Foundation Hospital as Defendants. However, several of the counts allege, without jurisdicational foundation, torts and criminal offenses committed against Plaintiff by co-workers, supervisors and psychiatrists. To the extent that these claims are against the individuals and not against the United States or its agencies, the counts are dismissed for lack of jurisdiction.

Accordingly, IT IS HEREBY ORDERED that Defendants' motion for summary judgment and/or to dismiss is GRANTED as to all counts in the fifth amended complaint.

DATED: Honolulu, Hawaii, August 28, 1981.

s/ Samuel P. King

United States District Judge

FOOTNOTES

1. Kaiser Foundation Hospital was named as a Defendant in the fifth amended complaint. Its motion to dismiss was granted on January 19, 1979.

2. In his affidavit, Assistant Chief of Police Pagan declares that his ethnic background is Puerto Rican and that he at no time took action against Plaintiff because Plaintiff is Caucasian. In their affidavits, Chief of Police Alexander J. Poniatowski and Commanding Officer Allen L. Shapero both declare that they are Caucasian and at no time took action against Plaintiff because he is Caucasian.

3. Since the record establishes clearly that Plaintiff was not satifying the normal job requirements, it is not necessary to decide whether he is a member of a protected group.

4. In its official notifications to Plaintiff of his proposed and final termination, the United States Navy stated its position that Plaintiff was disabled for the position of 085 security guard because he failed to meet the U.S. Civil Service Commission requirements that such guards (1) have no history of a significant psychiatric disorder where the position entails the use of firearm, and (2) be emotionally and mentally stable in order to be capable of courteous and tactful contact with the public and to work under trying and/or emergency conditions.

5. The record shows that Plaintiff's administrative claim under the FTCA was denied because the statute explicitly excludes liability for intentional torts such as the ones alleged by Plaintiff.

6. The same due process analysis has been held to apply even where a Plaintiff has a liberty interest because a stigma may attach to a person dismissed for the type of conduct involved. Johnson v. United States, 628 F.2d 187, 194 (D.C. Cir. 1980).

APPENDIX D

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE E. MARTIN,	) NO. 81-4461
	) D.C.# C-78-0338
Plaintiff-Appellant,	)
	) MEMORANDUM
v.	)
	)
UNITED STATES OF AMERICA,	)
	)
Defendant-Appellee.	)
	)

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF HAWAII
SAMUEL P. KING, DISTRICT JUDGE, PRESIDING
ARGUED AND SUBMITTED APRIL 23, 1982

Before: SCHROEDER, NELSON and BOOCHEVER, Circuit Judges.

The plaintiff was separated from his position as a security guard at the United States Naval Base, Pearl Harbor, Hawaii. He pursued his administrative remedies through the Merit Systems Protection Board which found, after a hearing, that the reasons for his separation (performance deficiencies and

medical disability) were supported by a preponderance of the evidence. The Board also concluded that Martin had failed to show that the action was racially motivated.

In this lawsuit, filed by Martin before his termination was effective, the district court found that the agency decision to terminate Martin was supported by substantial evidence, and that Martin could not make out a prima facie case of racial discrimination (disparate treatment). In so concluding, the district court considered the administrative record as well as the numerous pleadings, documents, affidavits and discovery generated in the civil suit. On the basis of this extensive record, the district court determined as a matter of law that Martin had raised only conclusory allegations which, even if accepted, would not establish his right to relief.

The essence of the plaintiff's claim is that he is entitled to a full judicial trial to determine his fitness for the job, and he contends that the administrative findings were based upon hearsay. As Judge King's thorough and well-reasoned opinion indicates, however, the record contains substantial evidence, not limited to hearsay reports, supporting the administrative findings. Under the applicable standards, we must affirm. Cafferello v. U.S. Civil Service Comm'n, 625 F.2d 285 (9th Cir. 1980).

Plaintiff has indicated that he has filed a claim under the Federal Employees Compensation Act, 5 U.S.C. §§ 8101 et seq. In accord with the government's representation at oral argument that the administrative claim will not be affected by this action, our judgment is without prejudice to the pursuit of that claim. Accordingly,

appellant's motion to vacate the district court's judgment on the tort claim issue is denied.

Affirmed.

APPENDIX E

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

BRUCE E. MARTIN,	)	NO. 81-4461
Plaintiff-Appellant,	)	
	)	ORDER
vs.	)	
UNITED STATES OF AMERICA,	)	
Defendant-Appellee.	)	

Before: SCHROEDER, NELSON and BOOCHEVER, Circuit Judges.

The panel as constituted in the above case has voted to deny the petition for rehearing.